Supreme Court, U.S.
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No. 98-357

In The

Supreme Court of the United States

October Term, 1997

ROSLYN NADEL,

Petitioner,

vs.

MORRISTOWN FIRE DEPARTMENT, MORRISTOWN POLICE DEPARTMENT, and MORRISTOWN MEMORIAL HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On February 14, 1998 plaintiff Roslyn Nadel filed a complaint for damages against the named defendants including Morristown Memorial Hospital (MMH) alleging that she had been unlawfully detained against her will following an epileptic seizure while crossing Speedwell Avenue in Morristown, New Jersey. When plaintiff "regained consciousness," she discovered she was being restrained by two firefighters. Thereafter, the police and ambulance arrived whereupon the ambulance squad put her on a stretcher, strapped her in and transported her to MMH.

A memorandum dated March 14, 1994, prepared by firefighter James M. Schultz concerning the events surrounding plaintiff's claim, referred to by the Appellate Division in its May 28, 1997 decision, stated that he and his fellow firefighter, Stanton, "observed a woman lying in a gutter in front of the West Tower Headquarters Place on Speedwell Avenue in Morristown". Upon approaching the woman, later identified as the plaintiff, firefighters Schultz and Stanton inquired of her whether she was okay. Her response, according to Mr. Stanton, "was not understood as her verbalization was impaired and she appeared to be disoriented. When she stood up, plaintiff started to walk into traffic and was almost hit by an approaching vehicle." (App. 14a-15a). After observing her condition, the firefighters positioned themselves in an effort to protect the plaintiff and continued to try to communicate with her. However, plaintiff became agitated and efforts to communicate with her proved futile.

Firefighter Stanton's memorandum recited that they were approached by "[a] bystander", presumably plaintiff's friend "Michael", who informed them that plaintiff suffered from seizures. When Mr. Stanton tried to obtain information about

plaintiff including her pertinent medical history and medications she might be taking, "the bystander just walked away repeating that she suffered from seizures before." (App 15a.)

Thereafter, the firefighters advised the police officers and ambulance squad of what had occurred and turned plaintiff over to the care of the ambulance squad. Mr. Schultz noted in his memorandum that plaintiff had become "very hostile and combative."

Upon her arrival at Morristown Memorial Hospital, according to the emergency room progress notes, plaintiff was "agitated and screaming." She was "pulling [at] wrist restraints" and stated "I'm going to sue all of you." Plaintiff's records from a prior admission to the hospital were obtained which reflected that she "has [a history of] sociopathic behavior." Once she had calmed down, plaintiff was permitted to make a telephone call. She contacted an attorney, Ira Ginsberg, who later picked her up from the hospital.

As a consequence of the incidents alleged, plaintiff claimed that she suffered disgrace, humiliation and shame as well as emotional distress and nervous shock. She asked her neurologist, Dr. Melvin Vigman to refer her to a psychiatrist. Plaintiff visited David G. Miller, M.D. who stated in a letter of October 19, 1992 that he had treated plaintiff since March 16, 1992 at which time she was suffering from "a Major Depressive Disorder, as well as Post-Traumatic Stress Disorder." Her symptoms, according to Dr. Miller, had improved with treatment. The October 19, 1992 letter recited plaintiff's "very traumatic life" consisting of multiple physical handicaps and long-term involuntary hospitalization during childhood.

Plaintiff had been struck by a car in 1989 and was treated at MMH for her injuries. Dr. Miller believed that plaintiff's

treatment at MMH following the incident in issue "reactivated many of her fears and negative reactions which had occurred during her previous treatment at Morristown Memorial Hospital in 1989." (App. 16a)

MMH filed its answer to the complaint on March 23, 1994 generally denying plaintiff's allegations. On March 8, 1995, MMH filed a motion to compel compliance with discovery demands made by MMH or alternatively dismiss plaintiff's action. Plaintiff had failed to respond to MMH's interrogatories and had failed to furnish medical expert information upon which she intended to rely in her case against the hospital.

Judge Friend entered an order on May 2, 1995 directing plaintiff to fully respond to MMH's interrogatories and provide medical authorizations within twenty days and expert reports within sixty days of the order. The order further provided that if plaintiff failed to provide the information set forth in the order, upon motion with notice to plaintiff, her complaint would be dismissed with prejudice as against the hospital.

On August 7, 1995, MMH moved to dismiss plaintiff's action for failure to comply with the May 2, 1995 order. On September 29, 1995 plaintiff filed her opposition to MMH's motion stating that she had found an expert, Dr. Phyllis G. Weisberg, whose letter was provided to MMH dated August 31, 1995. Plaintiff had been a student of Dr. Weisberg's at Trenton State College while she was enrolled in the Department of Special Education. On the basis of Dr. Weisberg's letter, Judge Russell denied MMH's motion to dismiss by order of October 16, 1995.

On December 4, 1995, MMH filed a motion for summary judgment on the ground that plaintiff had failed to provide the requisite expert proof needed to support her medical malpractice

action against the hospital. Dr. Weisberg's letter, MMH asserted, was in fact a letter of recommendation having no bearing upon Ms. Nadel's case against MMH. The letter, in fact, made no mention of the February 14, 1992 incident or treatment by MMH. Plaintiff opposed MMH's motion on March 8, 1996 claiming that "[s]ince [she] did not write out [her] complaint for Medical Malpractice [,] expert testimony is not necessary." On March 18, 1996, MMH replied to Ms. Nadel's papers in opposition stating that Ms. Nadel's action was, in fact, a medical malpractice action requiring expert testimony.

After Oral Argument on March 20, 1996, Judge Weinstein found that:

> the case and the facts in this case as presented . . . by the certifications, of both parties . . . is so overwhelmingly one-sided in favor of the defendant in this case, the Court [is] absolutely compelled to grant summary judgment on behalf of the defendant and to dismiss the complaint, and it's more than failure to present an expert's report . . . And without an expert, the plaintiff cannot get to the jury . . . I am not dismissing it for failure to provide an expert's report alone. I'm looking at all the facts of the case in the light most favorable to the opposing party, which is the plaintiff; and I am finding as a matter of law that those facts are so overwhelmingly one-sided in favor of the defendant Morristown Memorial Hospital that the Court under the *Brill* standard and after carefully evaluating the facts as I am instructed to do under that case, I am compelled to enter summary judgment against the plaintiff and on behalf of defendant, Morristown Memorial Hospital . . .

(App. 21a). Plaintiff's complaint was subsequently dismissed as against MMH by order of March 20, 1996. (App. 21a).

On appeal to the Appellate Division, that court concluded that Judge Friend had properly dismissed the case against the Morristown defendants under the New Jersey Tort Claims Act although it found that the Judge erred in finding that the federal court was the exclusive forum for plaintiff's action under the Federal Civil Rights Act, 42 U.S.C.A. § 1983. The Appellate Division, however, found nothing in the record to support a claim of a "city policy" evidencing "deliberate indifference" on the part of the City.

With regard to Plaintiff's claim under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. §§ 12101-12132, and the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, the court concluded that while, no doubt, the state courts are vested with concurrent jurisdiction to hear claims asserted under the Acts, the single incident describing receipt of emergency care for the epileptic episode provided no basis for a claim under the ADA or the Rehabilitation Act for disability discrimination. Said the Court:

> From what we can tell on this record, she received prompt, adequate attention with no perceptible injury or damages. The claim is clearly without merit under these federal statutes. R. 2:11-3(e)(2)(E).

(App. 26a). Finally, the Appellate Division found that Judge Weinstein had not erred in granting summary judgment to MMH for plaintiff's failure to provide an expert report since "as a matter of law . . . [the] facts are so overwhelmingly one-sided in favor of the defendant Morristown Memorial Hospital . . ." Said the Appellate Division with regard to plaintiff's late claim that her case sounded in assault and battery:

> . . . Plaintiff contends that this is an assault and battery false imprisonment claim against the hospital. She contends that she is not required to produce expert testimony to support such a claim. We disagree. The hospital rendered emergency treatment to a seizure victim brought in by the ambulance squad. We find no apparent or obvious deviation from the standard care rendered in emergencies like this in this record. Plaintiff was kept in the hospital for a few hours and then was released. Our law has long recognized emergencies as exceptions to the doctrine of consent. *See Perna v. Pirozzi*, 92 N.J. 446, 461 (1983); *Bennan v. Parsonet*, 83 N.J.L. 20 (S. Ct. 1912) (Garrison, J.) Without expert testimony plaintiff presented no prima facie case of medical malpractice or of excessive or improper treatment in this emergency context. A jury or fact-finder could only speculate as to the merits of plaintiff's claim without expert guidance. We cannot permit a jury to so speculate.

(App. 26a-27a). Plaintiff sought reconsideration of the order by the Appellate Division which motion was denied June 24, 1998. (App. 28a-29a) Plaintiff's Petition for Certification to the New Jersey Supreme Court was denied on October 28, 1997. (App. 30a-31a)

A. Morristown Memorial Hospital is a private non-profit hospital organized for charitable purposes pursuant to N.J.S.A. 53A-8 and is not liable to plaintiff under the provision of The Americans with Disabilities Act which are relied upon by plaintiff.

Plaintiff's Petition for Writ of Certiorari makes virtually no mention of Morristown Memorial Hospital. In her Statement of the Case, plaintiff states that she asserted a claim against

MMH for "battery and false imprisonment." Pet. 3. In fact plaintiff's action against MMH was a medical malpractice action dismissed on motion for summary judgment as a consequence of plaintiff's failure to comply with a court order compelling her to provide an expert report to support her claim against the hospital.

Plaintiff's only statement of a basis for filing a petition to this Court as against MMH is as follows:

> Petitioner asserts that Morristown Memorial Hospital also is in violation of the Americans with Disabilities Act by restraining Nadel to a bed for three to four hours for having an epileptic seizure, without allowing her to make a telephone call[.]

(Pet. 14). Plaintiff does not state how her allegations constitute a claim against MMH under the Act. Plaintiff's only discussion of the Act, contained in her Petition, pertains to the failure of public entities to properly train their personnel in responding to disabled persons. (Pet. 10-14). Morristown Memorial Hospital is a private non-profit hospital entitled to charitable immunity pursuant to N.J.S.A. 53A-8. It is not a public entity and is not, therefore, encompassed by the provisions of the Americans with Disabilities Act as relied upon by the Plaintiff.

Moreover, MMH was never made subject to plaintiff's claims asserted in the New Jersey courts under the Americans with Disabilities Act. There is, therefore, no basis for plaintiff's Petition for Certiorari as against MMH.[1]

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1. Although MMH does not intend to seek damages or costs, it is respectfully submitted that plaintiff's claim against MMH is frivolous under Rule 42 of this Court.

REASONS FOR DENYING THE WRIT

1. There are no compelling reasons which would justify the Court's review of plaintiff's Writ of Certiorari as against MMH. Under Rule 10 of this Court, the decision by the New Jersey Courts in this case did not decide an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. The New Jersey Courts did not decide an important question of federal law that has not been, but should be, settled by this court nor did they decide an important federal question in a way that conflicts with relevant decisions of this Court. Plaintiff has not alleged any erroneous factual findings or misapplication of a properly stated rule of law as against MMH.

Plaintiff's petition, in fact, fails to state any basis for this Court to review the Writ of Certiorari as against Morristown Memorial Hospital. On the record concerning plaintiff's case, it is clear that the New Jersey courts properly affirmed the grant of summary judgment to Morristown Memorial Hospital having applied the standard set forth in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 666 A.2d 146 (1995). The decision in favor of the hospital had no impact upon nor did it raise an important federal question warranting this Court's grant of plaintiff's petition.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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